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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al.,
Respondents.

WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

MOTION OF RESPONDENTS TO DISMISS WRIT OF CERTIORARI OR AFFIRM ORDERS OF UNITED STATES CIRCUIT COURT OF APPEALS AND DISTRICT COURT, AND BRIEF IN SUPPORT OF MOTION.

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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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MOTION OF RESPONDENTS TO DISMISS WRIT OF CERTIORARI OR AFFIRM ORDERS OF U. S. CIRCUIT COURT OF APPEALS AND DISTRICT COURT, AND BRIEF IN SUPPORT OF MOTION.

MOTION.

Dahl-Stedman Co., *et al.*, respondents in this cause, by Sigmund W. David, their attorney, move this Honorable Court to dismiss the writ of certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit, heretofore granted by this Court or, in the alternative, to affirm the orders heretofore entered by the United States Circuit Court of Appeals and the District Court of the United States in this cause, for the reasons that it is manifest that the petition for certiorari was filed for delay only and that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

BRIEF IN SUPPORT OF MOTION.

Opinions Below.

The District Court of the United States, for the Northern District of Illinois, Eastern Division, delivered no opinion.

The opinion of the Circuit Court of Appeals (R. 129.) has been reported in 95 F. (2d) 373.

Statement of the Case.

The petition for writ of certiorari was filed May 19, 1938. Respondents received a copy thereof on May 20th. Respondents desired an immediate disposition of the petition, and, as this Court intended to adjourn on May 31st, respondents thought that the filing of an answer by them might delay an immediate disposition. Also, respondents, upon reading the petition, believed that it presented no ground for the granting of the writ. For these reasons, respondents immediately, (May 20) waived their right to file a reply to the petition.

Upon reconsideration of the petition for certiorari, respondents have concluded that the petition presents such an erroneous statement of the facts in this case and of the legal principles involved that this Court was probably misled by reading the petition alone and not having the benefit of a reply thereto. Respondents further believe that a short and correct statement of the record facts and applicable legal principles will conclusively show that the petition for certiorari was filed for the purpose of delay only, and that no important or substantial legal question is involved in this writ.

The record in this cause consists solely of pleadings and orders. There was no testimony taken and there are no disputed facts. All the record facts are contained in the sworn petitions filed by respondents, the answers thereto of parties other than the petitioners Odell and Harris, the Master's reports, and the District Court's orders. Petitioners Odell and Harris filed *no* pleadings averring any facts or denying any of the facts alleged by respondents.

In spite of this, the statement of the case made by petitioners is incorrect and misleading. In it petitioners have ignored some of the record facts alleged and not denied, have misstated and misinterpreted others, have made some statements neither contained in nor having any basis in the record, and others directly contrary to the record. A correct statement of the case follows.

Respondents, Dahl-Stedman Co., *et al.* (Avery Brundage Co. was originally made a party by inadvertence), (R. 70.) are 277 building contractors, members of various building trade associations. (R. 18-22.) On April 9, 1935, their respective associations made a written agreement on their behalf with the Tax Service Association of Illinois, the bankrupt. In that agreement the bankrupt agreed to act for the members of the Associations, including respondents, to litigate the question whether the Illinois Retailers' Occupation Tax, commonly known as the Sales Tax, applied to the said contractors. (R. 23.) For its services the bankrupt was to be paid $1,500 in advance and an additional specified sum, not to exceed $20,000, if the Supreme Court of Illinois decided that the contractors were exempt from the tax. (R. 23.) The bankrupt agreed to retain the petitioner, Benj. F. J. Odell, as attorney for and on behalf of the contractors, but without expense to them. (R. 23.) The contractors agreed to follow such procedure as might from time to time be recommended by the bankrupt and Odell concerning filing of their monthly tax returns

and the escrowing of their taxes shown in such returns. (R. 23.) The agreement was signed on behalf of the bankrupt by the petitioner Harris, who was then Vice President and later became President of the bankrupt. (R. 24, 9.) Odell signed as follows: "I hereby consent to retention under the terms of this agreement." (R. 25.)

Respondents had no relations with Odell and Harris, except that Odell and Harris were acting for respondents under the terms of the agreement with the bankrupt. (R. 28, 30.) This agreement provided for the establishment of an Escrow Fund in order to carry out the purposes of the agreement. Pursuant to said agreement and the directions of the bankrupt, Harris and Odell, a so-called "escrow" was established at the National Builders Bank of Chicago, and respondents sent to the bankrupt their sales tax returns, both originals and duplicate copies. (R. 26-28.) Pursuant to the directions of the bankrupt, Harris and Odell, respondents made their checks for the monthly taxes payable to the Sales Tax Escrow Fund at the National Builders Bank of Chicago, sent them to the bankrupt, and the bankrupt deposited the checks in that Fund. (R. 26, 28.) The Escrow Fund was established at the bank by a letter dated May 2, 1935, signed by Odell, Harris and Craig, Craig being Secretary of one of the contractors' associations. (R. 27, 28.) This letter said:

> "There has been opened with you a certain account entitled Sales Tax Escrow Fund. There will be delivered to you from time to time hereafter for deposit to the credit of said account certain checks for various amounts issued by sundry contractors.
>
> "You are hereby instructed that the funds from time to time on deposit in said account are not the funds of the undersigned, but are under the custody and control of the undersigned pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois. Withdrawals from the account are to be made only on written order of the undersigned, three of whom must act together as indicated." (R. 27.)

In acting as custodians of this Fund, Harris and Odell were not acting as individuals but as representatives and agents of the bankrupt for the purpose of carrying out the agreement of April 9, 1935, between the respondents and the bankrupt. (R. 28.) The letter to the bank concerning the Escrow Fund expressly stated that Odell and Harris had no personal interest in the Fund but were mere custodians thereof. (R. 27.) Under the agreement of April 9, 1935, which expressly provided for the creation of the Escrow Fund, Odell and Harris were not to get any money, even if the litigation was successful, but the bankrupt was to get $20,000. (R. 23.) At the time respondents filed their original petition on May 24, 1937, the bankrupt, through its agents Odell and Harris, had control and custody of the Escrow Fund, although none of them were then acting for these respondents in any capacity. (R. 28, 30, 31-32.)

Pursuant to the agreement of April 9, 1935, the bankrupt kept books and records showing the amount that each respondent deposited each month in the Escrow Fund. (R. 29.) Some of the originals of the monthly tax returns sent by respondents to the bankrupt, pursuant to the agreement of April 9, 1935, and the directions of the bankrupt, Odell and Harris, were filed with the Illinois Department of Finance. Others of said originals and all of the duplicates were kept by the bankrupt. (R. 26-27.)

Pursuant to the agreement of April 9, 1935, the bankrupt and Odell, on September 4, 1935, instituted a suit in the Circuit Court of Cook County, Illinois, in which these respondents and some other contractors were the plaintiffs. (R. 29.) The suit was for an injunction to restrain the assessment and collection of the sales tax against the plaintiffs, upon the ground that the plaintiffs were exempt from the payment of said tax. (R. 29.) The bill was dismissed and an apppeal was taken to the Supreme Court of Illinois. (R. 29.) In February, 1937, the Illinois Supreme Court de-

cided, *Blome, et al.* v. *Ames, et al.*, 365 Ill. 456, against the plaintiffs, holding squarely that the contractors were not exempt from the sales tax. On April 2, 1937, pursuant to the mandate of the Illinois Supreme Court, a decree was entered in the Circuit Court giving the contractors until June 1st to pay their taxes, with interest at 3 per cent, and providing that, if they failed to file their returns and pay their taxes by June 1st, they would be subject to the penalty of 25 per cent plus interest at 5 per cent provided in the Sales Tax Act. (R. 29-30.)

On May 3, 1937, an involuntary petition in bankruptcy against the bankrupt was filed and the District Court appointed a Receiver. (R. 2.) On May 24, 1937, respondents filed their sworn petition. (R. 18.) At that time respondents had over $297,000 of their money in the Escrow Fund and the bankrupt, acting through its agents Odell and Harris, had custody and control of the Escrow Fund and, therefore, of respondents' money. (R. 28, 32.) Craig was willing and desired to release to respondents the money belonging to them in the Escrow Fund. (R. 33.) The bankrupt, Odell and Harris were not, and had refused to release any of it. (R. 32-33.) Many of the original tax returns of respondents and all of their duplicate tax returns, which belonged to them and which they needed in order to determine the amount of their taxes, how much they had in the Escrow Fund and how much was due to the State, etc., were in the possession of the bankrupt and its agents Odell and Harris (R. 33-34), who had refused to turn them over to respondents or to the Receiver of the bankrupt. (R. 32-33.) The books and records of the bankrupt showing the amount that each respondent had deposited each month in the Escrow Fund were in the possession of the bankrupt and its agents Odell and Harris, and they had refused to turn them over either to the respondents or to the Receiver. (R. 33.)

Respondents' petition filed May 24, 1937, averred all of the foregoing facts and prayed that respondents' money in the Escrow Fund, which was in the custody and control of the bankrupt and its agents Odell and Harris, be turned over to respondents; that respondents' original tax returns which had not been filed, and all of respondents' duplicate tax returns, which they had delivered to the bankrupt and which were in the possession of the bankrupt and its agents Odell and Harris, be turned over to respondents; and that the books and records of the bankrupt showing the amount each respondent had deposited in the Escrow Fund, which were in the possession of the bankrupt and its agents Odell and Harris, be delivered to the Receiver and made available for inspection by respondents. (R. 18-38.)

Due notice of the presentation of this petition was given to the Receiver of the bankrupt, the bankrupt, Harris, Odell, Craig and the National Builders Bank of Chicago. *Without objection from any of them,* the District Court entered an order on May 24th giving leave to respondents to file their petition, making the above named parties respondents to the petition, and ordering them to file their answers to the petition by May 27, 1937, and that the matter be set for hearing upon the petition and answers on May 27, 1937. (R. 17, 18.)

Upon agreement and approval in writing by respondents, the petitioning creditors, the Receiver, the bankrupt, the National Builders Bank, Odell, Harris and Craig, the District Court entered its order of May 27, 1937. (R. 39-41.) The order states that all parties had agreed in open court that the court had jurisdiction to enter the order. (R. 39.) In the order it was agreed that there was $314,885.95 in the Sales Tax Escrow Fund, as alleged in the petition of these respondents; (R. 39.) that the greater portion of it represented the proceeds of checks deposited in the Fund by respondents, and the balance of it represented the pro-

ceeds of checks deposited by other contractors represented by Odell; (R. 39.) and that Odell agreed to the order not merely for himself, as respondent to said petition, but also on behalf of the contractors represented by him. (R. 40.) It was ordered by the District Court that out of the Sales Tax Escrow Fund there be paid *instanter* to the Department of Finance of the State of Illinois 75 per cent of the proceeds of checks of each of the respondents herein and each other contractor deposited in said Fund, plus interest thereon, said 75 per cent plus interest amounting to $242,200; that Odell, Harris and Craig sign *instanter* a joint check for $242,200 payable to the Department of Finance, and that the National Builders Bank of Chicago honor and pay said check out of the Sales Tax Escrow Fund; that within 5 days these respondents furnish to the petitioners herein an itemized statement showing the amount that each of these respondents claimed to have deposited in said Fund; that said list and the amounts thereof be checked and examined by Odell; that he report the result thereof to the attorney for these respondents, and that, if there be any differences in the figures furnished by these respondents and the figures in the hands of said Odell, said differences be determined by the court; *"that the balance of the money in said Sales Tax Escrow Fund in the National Builders Bank amounting to $72,685.96 shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this Court * * *; that all claims and rights in and to said balance of $72,685.96 in said Sales Tax Escrow Fund in said National Builders Bank of Chicago, are hereby referred to Referee William L. Sullivan upon petition of petitioners and the answers and other pleadings filed and hereafter filed thereto."* (R. 39-41.)

The bank's answer to the petition admitted the amount in the Sales Tax Escrow Fund and "disclaimed all interest

in the other allegations in the petition." (R. 46.) Craig answered that he was ready, willing and eager to comply with any request of these respondents in regard to the disposition of the moneys deposited by them in the bank and to release or disburse said moneys in said Fund in accordance with these respondents' desire. (R. 47.) The Receiver of the bankrupt answered that he had in his possession none of the documents referred to in the petition; that the checks of these respondents deposited in the Escrow Fund were deposited not only for the purpose of having on hand and available sufficient moneys to pay the taxes on respondents' returns, if it was decided that these respondents were not exempt from said tax, but also for the purpose of assuring payment to the bankrupt of such amount as might be due it under the agreement of April 9, 1935, in the event of a favorable decision; that the portion of the Sales Tax Escrow Fund on deposit with the bank which was furnished by these respondents was subject to the jurisdiction and order of the court; (R. 50) that he, as Receiver of the bankrupt, was entitled to the possession of all the originals and duplicate returns of these respondents in the possession of the bankrupt and Odell and Harris, and all the books, records and accounts of the bankrupt showing how much was deposited in the Escrow Fund by these respondents, which were in the possession of the bankrupt, Odell and Harris, and that they had not been turned over to him; and that he as Receiver had an interest in the moneys deposited in the Sales Tax Escrow Fund in an amount not to exceed $20,000. (R. 51, 52.)

At the time the agreed order of May 27, 1937, was entered, there was a motion of the bankrupt pending to quash the service of process upon the bankrupt, alleging lack of jurisdiction of the court over the bankrupt because of alleged defective service. (R. 6.) Odell, Harris and the bankrupt filed pleas to respondents' petition of May 24, 1937,

on June 3, 1937. These pleas alleged that the District Court was without jurisdiction to determine any rights relating to the petition of these respondents while the question of the court's "bankruptcy jurisdiction" over the bankrupt was pending undetermined because of the pendency of the bankrupt's motion to quash the service upon it. (R. 54-56.) On June 29th the District Court denied the bankrupt's motion to quash the service of process, struck its special appearance, and ordered and decreed that the bankrupt had appeared in the cause generally and that the court had jurisdiction to determine the merits of the cause, (R. 75-76.) and ordered the bankrupt to file its answer on the merits, which the bankrupt did on July 2nd. (R. 77.)

After this order of June 29th was entered, these respondents filed their petition of June 29, 1937. On that day the remaining balance in the Sales Tax Escrow Fund was in the custody and under the control of the District Court, as it had been in the possession and control of the bankrupt and its agents when the bankruptcy petition was filed, and the Court's *custodia legis* had been acknowledged and confirmed by all parties in the agreed and approved order of May 27, 1937. (R. 41.) By the terms of the letter of April 2, 1935, relating to the Escrow, there was required for withdrawal of the Fund from the bank the joint signatures of Craig and the bankrupt's agents Odell and Harris. Craig had put himself on record that he had no interest in the Fund and was willing to turn it over to these respondents. (R. 47.) Odell and Harris had no interest personally in the Fund. (R. 27; 39-40.) Over $68,580 of the $72,758 in the fund belonged to these respondents. (R. 70, 71, 97.) This had been ascertained by checking and verifying, pursuant to paragraph 3 of the agreed order of May 27, 1937, (R. 40.) the amount each of these respondents had deposited in the Fund. (R. 70, 71.) The Receiver of the bankrupt claimed that by reason of the agreement of April 9,

1935, he was entitled to $20,000 of this Fund. $48,580.40 of the Fund belonged to these respondents, free of any claim of anyone. These respondents' petition set forth all of the above facts, (R. 69-72.) and asked that this $48,580.40 be turned over to them, leaving $20,000 of their money in the Fund so that any claims of anybody arising out of the agreement of April 9, 1935, might be reserved and later adjudicated. (R. 71-72.)

No one objected to the petition or to these respondents' getting this $48,580.40 except the bankrupt (which did not stand on its objections) and Odell and Harris. (R. 74, 97.) The court directed Odell and Harris to answer the petition, and each of them stated that they did not desire to answer it. (R. 74.) The motion of the bankrupt to quash service upon it had been overruled and the court had taken jurisdiction of the bankruptcy petition on the merits. Odell's special answer and Harris' motion to strike these respondents' petition of May 24, 1937, were based solely upon the pendency of the bankrupt's motion to quash service. In spite of this, Odell requested that his special answer to these respondents' petition of May 24th, and Harris requested that his motion to strike said petition of May 24th, stand as their respective answers to these respondents' petition of June 29th. (R. 74.) There was thus no question of jurisdiction before the court presented by Odell's and Harris' answers to these respondents' petition of June 29th. The court expressly invited Odell and Harris to answer this petition on the merits, but they insisted that they wanted to stand on their special answers of alleged lack of jurisdiction. Since, under these circumstances, there was no question presented to the court or, at the most, merely a question of law, the District Court could and should have acted on these respondents' petition *instanter*. However, it referred the matter to a Referee, acting as a Special Master. (R. 73-75.)

The Referee filed his report on July 7th. (R. 78-88.) Odell and Harris asked and obtained leave to file their exceptions to the report, and filed the same. (R. 92.) After consideration of the exceptions, the District Court entered its order of July 12, 1937, which is one of the orders appealed from. (R. 96-99.) In this order the Court found that the allegations of these respondents' petition of June 29th were true; that the Court had jurisdiction over the Escrow Fund and of the parties thereto, including Odell, Harris, Craig, the bankrupt and the bank; that there was $68,580.40 in the Escrow Fund which was the proceeds of checks of these respondents deposited in the Fund, and that of said $68,580.40, $48,580.40 was the money of and belonged to these respondents, free from any claim or demand of any kind whatsoever of any of the parties including the bankrupt, the Receiver, Odell, Harris, Craig and the National Builders Bank; and that George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, were authorized to receive on behalf of these respondents the money belonging to respondents in the Fund. The court thereupon ordered that the exceptions of Odell and Harris be overruled and that Odell, Harris and Craig sign a joint check on the Fund for $48,580.40 and deliver it to these respondents, and that after the payment of said check the balance remaining in said Fund amounting to $24,178.35, should remain and be held in the Fund subject to the further order of the Court. (R. 96-99.) Odell's and Harris' motion to file a second supplemental answer was denied. (R. 96.)

On July 13th, on motion of these respondents, the Court ordered Odell and Harris and the bankrupt to answer to the merits concerning the $20,000, which these respondents and the Receiver of the bankrupt both claimed and which was the limit of any claim, no matter how unfounded or chimerical, which Odell and Harris might have against the

Escrow Fund, and which $20,000 had been left subject to the further order of the court. (R. 99-100.) Given the opportunity to answer to the merits concerning, or state the basis of any claim they might have to the $20,000, Odell and Harris refused to do so and filed a "special answer," merely reasserting that the court had no jurisdiction over the Fund. (R. 110.) Odell and Harris appealed from this order of July 13th as well as that of July 12th.

The Circuit Court of Appeals affirmed with costs the orders appealed from, (R. 134.) denied petitioners' petition for rehearing, and ordered that petitioners pay to respondents interest on $48,580.40 at the rate of 5 per cent per annum from July 12, 1937, until said $48,580.40 is paid. (R. 197.)

The above statement of facts is accurate and presents fairly all the record facts. It is therefore not our intention to direct attention in detail to all of the misstatements and omissions of record facts and the deliberate attempt to confuse this Court, contained in the petition for writ of certiorari. However, as the writ was granted upon the face of the petition, the nature of the petition and the lack of good faith of petitioners in filing it may be observed from just a few of the statements contained in the petition. For instance:

Petitioners claim and stress the fact that after the agreement of April 9, 1935, numerous contractors, by separate written contracts, separately engaged Odell to represent them and that, by reason of these separate engagements, he is entitled to a lien on the Escrow Fund. (Petition for certiorari, pp. 2, 24.) To support this, petitioners annex an appendix (p. 33) purporting to exhibit one such contract. No such claim of a lien and no such contract appear in the record in the District Court.

Petitioners assert (Petition for certiorari, pp. 3, 24) that

the Supreme Court of Illinois decided *in favor of* the contractors in the case of *Blome Co.* v. *Ames,* 365 Ill. 456; that thereupon the Illinois Department of Finance was compelled to change its rulings, and subsequently the Illinois Supreme Court in *Herlihy Mid-Continent Co.* v. *Nudelman,* 367 Ill. 600, voluntarily modified its decision, and thus, as a result of the efforts of Odell, the respondents are now exempt from the sales tax. Not one of these statements is true. The contractors' suit was decided *against* the contractors. The case of *Blome Co.* v. *Ames,* 365 Ill. 456, held that the contractors were not exempt from the tax. A reading of the opinion in that case is all that is necessary to determine that fact. After a final decree was entered in the *Blome* case, the contractors, with the consent and approval of Odell, paid to the State $242,200 on account of the taxes from which petitioners now assert Odell was successful in having the contractors held exempt. (R. 39, 69-71.) In December, 1937, six months after the orders here appealed from were entered by the District Court, the Illinois Supreme Court rendered its decision in the case of *Herlihy Mid-Continent Co.* v. *Nudelman,* 367 Ill. 600. The *Herlihy* case had no connection with the *Blome* case, none of these respondents were parties to the *Herlihy* case, and Mr. Odell had no connection therewith either as party or attorney.

Petitioners reiterate (Petition for Certiorari, pp. 5, 6, 26) that the order of June 29, 1937, which found that the petitioners did not desire to answer these respondents' petition, etc., was a purported order obtained under most unusual circumstances by the attorney for these respondents, and was false. This assertion accusing respondents' attorney of unprofessional conduct is utterly baseless and has no support whatsoever in the record. Petitioners made no attempt at any time to correct this alleged false and fraudulent order; they did file exceptions to the Master's

report, in which they made a similar assertion about the order, and these exceptions the District Court overruled. (R. 92, 96.) This brazen and baseless charge against counsel for respondents comes with total disregard of the proprieties due to this Court and an attorney privileged to practice before it, and it comes from a lawyer whose unethical conduct has recently been severely censured. See

Odell v. *Bausch & Lomb Optical Co., et al.*, (C. C. A. 7th Cir.) 91 F. (2d) 359; certiorari denied 302 U. S. 756, 780; 82 L. Ed. 232, 347.

Petitioners stated in their Petition for Certiorari (pp. 22, 23) and made it appear as if such statement was based upon the record, that the order of May 27th was entered at the solicitation and suggestion of the District Court, and that it was agreed in open court that the consent to the distribution would not jeopardize the petitioners' rights to have determined the question of the jurisdiction of the Court over the 25 per cent balance of the Escrow Fund. This is untrue and in direct contradiction to the record. There was no consent requested by the Court, there was no such insistence by the petitioners, there was no such agreement made. On the contrary, the order itself, which was agreed to and approved by the petitioners in writing, expressly provided that the Court take jurisdiction and determine the distribution of the balance of the Fund. (R. 4[illegible].)

The Petition for Certiorari states (p. 5) that on June 29, 1937, respondents abandoned their petition of May 24th. The record shows the contrary; respondents' petition of June 29th was based upon and supplementary to their petition of May 24th. (R. 69-72, 99, 100.)

Petitioners insist that the bankrupt was not a moneyed, business or commercial corporation and, therefore, the court had no jurisdiction over it, that there was no adjudi-

cation of the bankrupt, and these points are the subject matter of two of their legal arguments. (Petition for Certiorari, pp. 4, 29.) Petitioners did not think it was necessary to inform this Court that before they filed their petition for certiorari the Special Master had reported to the District Court that "certainly there was nothing eleemosynary in and about the Tax Service Association of Illinois, the alleged bankrupt. It conducted a business pure and simple. * * * About the only 'not for pecuniary profit' feature of the Association was its 'not for pecuniary profit' charter"; (R. 178.) that on April 27, 1938, the District Court approved the Master's report, specifically found that the alleged bankrupt was and is a moneyed business or commercial corporation amenable to an involuntary petition in bankruptcy, and adjudicated it a bankrupt; and that no appeal or review of such order has ever been sought. (Appendix A, *infra*, p. 40.)

Reasons for Granting Respondents' Motion.

1. No substantial question of law is involved in this cause. The facts are undisputed, and if the undisputed facts are considered the legal questions presented by the petition for a writ of certiorari are trivial.

2. No real, but only a pretended, question of jurisdiction exists in this case.

(a) This case is not, as stated by petitioners, a dispute between two strangers not involving the bankrupt estate and in which the bankrupt has no interest. The orders appealed from concern an Escrow Fund. That Fund (together with documents owned by respondents of great importance to them), at the time the District Court took jurisdiction of the Fund, (1) was in the legal possession and actual control of the

bankrupt and its agents, Odell and Harris; and (2) part of the Fund was claimed by respondents to be their property and part of it the Receiver of the bankrupt claimed belonged to the bankrupt.

(b) With the consent of all parties, including the petitioners, the Escrow Fund came into *custodia legis* of the District Court, and with the consent of all parties, including petitioners, the greater part of the Escrow Fund was distributed and the balance was left subject to the further order of the District Court. After the District Court denied the bankrupt's motion to quash service upon it, no possible question of the jurisdiction of the court over the parties or the balance of the Escrow Fund remained. The order of July 12, 1937, merely distributed part of the balance of the Fund and the order of July 13, 1937, merely ordered petitioners to plead any interest they might have in the $20,000 remaining in the Fund.

3. The appeal to the Circuit Court of Appeals and the petition for a writ of certiorari to this Court were filed for delay only. Petitioners, Odell and Harris, were, at the most, mere stakeholders or custodians of that part of the Escrow Fund they had been ordered to distribute to its owners, and had no other interest therein and, therefore, have no appealable interest.

4. At no step in the proceedings did the District Court abuse its discretion or deny petitioners any legal rights.

5. The decision of the Circuit Court of Appeals presents no important question of general law or of particular interest, nor is that decision in conflict with any decision of any Court of Appeals or of this Court, nor does the decision involve an important question of general or federal or bankruptcy law which this Court has not decided.

SUMMARY OF ARGUMENT.

I.

The District Court Had Jurisdiction to Enter the Orders Complained Of.

A. A bankruptcy court has full and complete jurisdiction over the property in the possession, control or custody of a bankrupt or of a bankrupt's agent.

Page v. *Arkansas Natural Gas Corp.*, (C. C. A. 8th Cir.), 53 F. (2d) 27, 33; affirmed in 286 U. S. 269, 76 L. Ed. 1096.

Gamble v. *Daniel*, (C. C. A. 8th Cir.) 39 F. (2d) 447; certiorari denied 282 U. S. 848, 75 L. Ed. 752.

Taubel-Scott-Kitzmiller Co. v. *Fox*, 264 U. S. 426; 68 L. Ed. 770, 774.

Mueller v. *Nugent*, 184 U. S. 1, 15; 46 L. Ed. 405, 411.

Babbitt v. *Dutcher*, 216 U. S. 102; 54 L. Ed. 402, 406.

In re Kerr, 5 F. Supp. 898, 899.

In re Wein, 13 F. (2d) 426, 427.

Remington on Bankruptcy (4th Ed. 1936), Vol. 5, p. 554.

B. The orders appealed from concern an Escrow Fund. That Fund was in the legal possession and actual control of the bankrupt and its agents Odell and Harris when the bankruptcy petition was filed; and part of the Fund was claimed by respondents to be their property and part of it the Receiver of the bankrupt claimed belonged to the bankrupt.

C. Petitioners agreed on May 27th to the Court's jurisdiction over them and the Escrow Fund and to the Court's distributing the Fund. Afterwards, on June 3rd, they filed special pleas of lack of jurisdiction of the Court because of the pendency of the bankrupt's motion to quash the service upon it. When that motion to quash was denied on June 29th, no possible question of the Court's jurisdiction of the parties or the balance of the Escrow Fund remained.

II.

Petitioners Odell and Harris Are Estopped to Complain of or Appeal from the Orders of July 12, and 13, 1937.

McGowan v. *Parish*, 237 U. S. 285; 59 L. Ed. 955.

Swift & Company, et al. v. *United States*, 276 U. S. 311; 72 L. Ed. 587.

Page v. *Arkansas Natural Gas Corp.* (C. C. A. 8th Cir.), 53 F. (2d) 27, 35, affirmed in 286 U. S. 269, 76 L. Ed. 1096.

Bullard v. *Commissioner* (C. C. A. 7th Cir. 1937), 90 F. (2d) 144, 147.

Bachman v. *McCluer*, (C. C. A. 8th Cir. 1933), 63 F. (2d) 580, 583.

In re Bacon, (C. C. A. 2nd Cir. 1908), 159 F. 424, 426.

In re Rockford Produce & Sales Co. (C. C. A. 7th Cir. 1921), 275 F. 811, 814.

In re J. C. Winship Co. (C. C. A. 7th Cir. 1903), 120 F. 93, 96.

Remington on Bankruptcy (4th Ed. 1936), Vol. 5, p. 330.

A. Odell and Harris expressly agreed that the District Court had the right and authority to determine rights in and claims to the Escrow Fund and to distribute it (which is all the orders appealed from attempt to do or do). They complied with the order of the Court, distributing over 75% of the Fund. They turned over the custody and control of the balance of the Fund from themselves, as agents of the bankrupt, to the Court.

Having done these things, they are estopped from claiming that the Court had no "jurisdiction" to distribute to respondents that part of the balance of the Fund which belonged to respondents and to which no other person had any claim.

B. Petitioners cannot, in June, 1937, object to the jurisdiction of the Court when in May, 1937, they expressly agreed that the Court had that identical jurisdiction and joined in inducing the Court to enter its order, which it could not have entered unless it had jurisdiction. But, even if the Court did not have jurisdiction over petitioners and the Escrow Fund by reason of the allegations of these respondents' petition (which, in fact, it did have), it acquired jurisdiction by reason of the explicit consent of all parties concerned, including petitioners. This is not the kind of jurisdiction, such as that dependent on a diversity of citizenship, which cannot be exercised by consent.

III.

The Appeal to the Circuit Court of Appeals and the Petition for a Writ of Certiorari to This Court Were Filed for Delay Only. Petitioners Odell and Harris Were at the Most Mere Stakeholders or Custodians of That Part of the Escrow Fund They Had Been Ordered to Distribute to Its Owners, and Had No Other Interest Therein and, Therefore, Have No Appealable Interest.

Hamilton Trust Co. v. *Cornucopia Mines Co.* (C. C. A. 9th Cir. 1915), 223 F. 494, 499.

King v. *Buttolph, et al.* (C. C. A. 9th Cir. 1929), 30 F. (2d) 769, 770.

Grier, et al. v. *Union Nat. Life Ins. Co.*, 217 F. 293.

Kirkpatrick v. *Eastern Milling & Export Co.*, 135 F. 151, 152.

IV.

At No Step in the Proceedings Did the District Court Abuse Its Discretion or Deny Petitioners Any Legal Rights.

ARGUMENT.

I.

The District Court Had Jurisdiction to Enter the Orders Complained Of.

Irrespective of the consent of petitioners to jurisdiction or the estoppel against them to deny it, the District Court had jurisdiction to enter the orders of May 27, July 12, and July 13, 1937. In essence, this was a simple reclamation suit. These respondents were the owners of property (their Sales Tax returns and their money in an Escrow Fund) they desired to reclaim. Their property was in the custody and control of the bankrupt and its agents Odell and Harris. (R. 18-37.) The Receivers of the bankrupt claimed that part of the property (*i. e.*, the Sales Tax returns and part of the Fund) belonged to him and that all the property was under the jurisdiction of the Court. (R. 48-53.) The bankrupt and its agents Odell and Harris had refused to turn respondents' property over to respondents or to the Receiver. (R. 31-34.)

A bankruptcy court unquestionably has jurisdiction of property in the custody or control of a bankrupt or its agent at the time a petition for bankruptcy is filed. The facts which gave the Court jurisdiction were alleged in respondents' original petition filed May 24, 1937, (R. 18-38.) and were never denied by any of the parties, including petitioners. On the contrary, all the parties conceded the existence of these jurisdictional facts by their consent to both the findings of fact and the decretal part of the District Court's order of May 27, 1937. (R. 39-41.)

The rule of law that the District Court has jurisdiction of property which is in the possession, control or custody of the bankrupt or its agent at the time of the filing of the petition in bankruptcy has often been announced by this Court and other Federal Courts. The rule is well stated in

Page v. *Arkansas Natural Gas Corporation*, 53 F. (2d) 27; affirmed 286 U. S. 269,

where the court said, p. 33:

> "So far as concerns jurisdiction over property, the actual or constructive possession, after the filing of bankruptcy petition, by the bankruptcy receiver, trustee, marshal, or referee, or *by the bankrupt or his agents*, or by someone not claiming beneficial interest * * * constitutes '*custodia legis*' for the purpose of 'assumption of jurisdiction' by the bankruptcy court. And the bankruptcy court 'assumes jurisdiction' over 'property', and the property comes into its '*custodia legis*', if, after the filing of the bankruptcy petition, it is in the custody or control of the receiver in bankruptcy or of the trustee, marshal, referee, *bankrupt, bankrupt's agent*, or of someone not claiming beneficial interest." * * * (Italics ours.)

One of the most thorough discussions of this rule is contained in the case of

Gamble v. *Daniel*, (C. C. A. 8th Cir.) 39 F. (2d) 447; certiorari denied 282 U. S. 848, 75 L. Ed. 752,

citing many cases decided by this Court. The Gamble case decided that the jurisdiction of a bankruptcy court over property is determined by the fact that the property is in the possession of the bankrupt or its agent at the time the petition in bankruptcy is filed; that such possession need not be actual, but may be constructive; that such constructive possession exists in many instances, such as when the property is in the control or the custody of the bankrupt's agent, or of one who makes a claim to the property which

claim is colorable only, or where it is held by someone for the account of the bankrupt, etc., and that when the Court has jurisdiction over such property it has the jurisdiction by summary proceedings to adjudicate the rights of various parties in and all claims to said property.

To the same effect see

Taubel-Scott-Kitzmiller Co. v. *Fox,* 264 U. S. 426; 68 L. Ed. 770, 774.

Mueller v. *Nugent,* 184 U. S. 1, 15; 46 L. Ed. 405, 411.

Babbitt v. *Dutcher,* 216 U. S. 102; 54 L. Ed. 402, 406.

In re Kerr, 5 F. Supp. 898.

Remington on Bankruptcy, (4th Ed. 1936) Vol. 5, p. 554.

Petitioners claim that a bankruptcy court has jurisdiction only of property which is in the physical possession of an officer of the court or deposited in court, and to determine controversies only over property which belongs to the bankrupt. These assertions are refuted by the cases cited above. If a bankruptcy court had jurisdiction only over the bankrupt's property, then it would have no jurisdiction over reclamation proceedings. As was said by the court in

Gamble v. *Daniel,* 39 F. (2d) 447,

p. 454:

> "Administration of property by a bankruptcy court involves several elements. One of these is collection of the property of the bankrupt. In that sense, the bankruptcy court has jurisdiction (as above shown) to administer on all property in actual or constructive possession of the bankrupt at the time the petition is filed. Such jurisdiction is the power to determine what title or right or interest the bankrupt may have

> therein and make orders in pursuance of such determination. This exists irrespective of the character of title, right, or interest claimed therein by others, and has often been exercised where the claim was that the bankrupt held as Trustee.'

In the instant case, not only were the entire Escrow Fund and the Sales Tax returns of respondents in the possession, control and custody of the bankrupt and its agents Odell and Harris, but the bankrupt, through its Receiver, claimed that $20,000 of the Escrow Fund was the property of the bankrupt and possession of the returns belonged to the Receiver. Petitioners raise only a pretended, not a real, question of jurisdiction. Their claim of no jurisdiction ignores the record facts and is based upon the theory that neither Odell nor Harris were agents of the bankrupt and that the bankrupt had nothing to do with the Escrow Fund. The record facts are to the contrary. A reading of respondents' petition, (R. 18-38.) particularly the contract between the bankrupt and respondents (R. 22-25.) and the letter establishing the Escrow Fund (R. 27-28.) will suffice to prove that the Escrow Fund, immediately upon the filing of the petition in bankruptcy, was in *custodia legis* of the Court because it was then in the custody and control of the bankrupt and its agents. The Escrow Fund was part and parcel of the entire plan agreed upon in the contract of April 9, 1935, in which the bankrupt was one party, these respondents the other and Odell was the agent selected by the bankrupt for the purpose of enabling the bankrupt to make $20,000. (R. 23-26.) The Escrow Fund was established pursuant to the agreement between these respondents and the bankrupt; respondents consented to the establishment of the Escrow Fund and sent their checks to be deposited in it pursuant to the suggestion and request of the bankrupt and Harris and Odell. Odell's and Harris' relations and connection with these respond-

ents were created and limited solely by the agreement of April 9, 1935, and the approval of Odell's engagement as attorney executed by some of the respondents pursuant thereto. (R. 25, 28.)

The cases upon which petitioners rely do not disagree with the principles of law stated above. They are not applicable to the facts in the instant case.

Petitioners never attempted to plead any fact tending to show that the District Court did not have jurisdiction. Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of a party without any facts in support thereof. Even a third party or an adverse claimant may be ordered by a bankruptcy court to turn over property on a summary proceeding when he has done nothing more than to question jurisdiction. See

In re Wein, 13 F. (2d) 426.
Gamble v. *Daniel*, 39 F. (2d) 447.
In re Silverman, 299 F. 959.
Babbitt v. *Dutcher*, 216 U. S. 102; 54 L. Ed. 402.
May v. *Henderson*, 268 U. S. 108; 69 L. Ed. 870, 874.

The petition for certiorari makes the claim that a bankruptcy court has jurisdiction only over controversies relating to the property of a bankrupt, and that there is no bankrupt until there is an adjudication. The rule necessarily is to the contrary. As was said in

8 Corpus Juris Secundum, Bankruptcy, Sec. 153, p. 600:

"Third persons having an adverse claim or title giving them the right to possession of property which has come into the custody or control of a bankruptcy court pending an adjudication may assert such title and claim possession of such property by proper pro-

ceedings in the bankruptcy court; but this is the only way in which such claims can be asserted, as the bankruptcy court, by reason of its possession of the property, acquires exclusive jurisdiction to pass thereon."

* * * * * *

"Where several conflicting claims are asserted to property in the possession of a bankruptcy receiver, the bankruptcy court thereby acquires jurisdiction to determine the rights of the respective claimants in the property although the receiver cannot possibly have any interest therein."

See also

5 Remington on Bankruptcy, 4th Ed. 1936, p. 580.

Central Republic Bank & Trust Co., et al. v. *Caldwell, et al.*, (C. C. A. 8th Cir., 1932) 58 F. (2d) 721.

In re J. C. Winship Co., (C. C. A. 7th Cir., 1903) 120 F. 93, 96.

Denton v. *Gurnett & Co.*, 69 F. (2d) 750.

Even if the orders of the District Court were premature because there had been no adjudication when they were entered, no useful purpose would be served by reversing them except to afford petitioners further delay in turning over to respondents their property. Petitioners failed to inform this Court that before their petition for certiorari was filed in this Court there was an adjudication of the bankrupt from which no appeal has been sought. (Appendix, *infra*, p. 40.)

The District Court not only had jurisdiction of the Escrow Fund, the Sales Tax returns and records, but it is the only Court which had jurisdiction and to which respondents could have resorted. Had respondents instituted proceedings in any other court, the District Court undoubtedly would have restrained them.

II.

Petitioners Odell and Harris Are Estopped to Complain of or Appeal from the Orders of July 12, and July 13, 1937.

Petitioners, together with the other parties interested in the bankruptcy proceedings, approved of and agreed to the order of May 27, 1937, which found that the District Court had jurisdiction of the Escrow Fund and the parties thereto and over the distribution of the entire Fund, including that part of it remaining after the payment of 75% to the Illinois Department of Finance. (R. 39-41.) Petitioners complied with the order of May 27th by (1) distributing 75% of the Fund, and (2) checking the amount that each of the respondents claimed to have deposited in said Fund. (R. 70, 79, 87.) Petitioners now object to the entry of the orders of July 12, and July 13, 1937, on the ground that the Court had no jurisdiction to order distribution of any part of the Escrow Fund. Thus, their appeal is based on an objection to an action of the Court which they expressly consented to, approved of and participated in. Courts have invariably held that under such circumstances a party is estopped from appealing and that the order appealed from should be affirmed without consideration of the merits of the cause. A leading case which presented a situation almost identical to that of the instant case is

McGowan v. *Parish*, 237 U. S. 287; 59 L. Ed. 955.

In that case plaintiff's testators were attorneys who had been retained on a contingent fee basis to enforce a claim against the United States. After they had rendered services, their client discharged them and retained other attorneys who finally had the claim allowed. The

original attorneys thereupon instituted a suit in equity tying up the sum awarded to their former client and making the Secretary of the Treasury and the Treasurer of the United States parties defendant. A consent decree was entered by which all of the fund, except that which the original attorneys claimed, was paid to the client and the balance which was claimed by the original attorneys placed in a bank subject to the further order of the Court. In the suit to determine who was entitled to said balance of the fund, the defendant raised the question of the Court's jurisdiction over the fund.

The Court held that the objection of jurisdiction over the fund had been waived by the defendant by its consent to the decree ordering distribution of part of the fund to the defendant and that the balance be held subject to the order of the Court, and that this decree amounted to a waiver of jurisdictional questions.

The Court further held that no issue other than the one previously reserved by the consent decree could be raised by the defendant in her answer to the bill of complaint.

In *Bullard* v. *Commissioner of Internal Revenue*, (C. C. A. 7th Cir. 1937) 90 F. (2d) 144,

the Court said:

"• • • In (Freeman on Judgments) volume 2 (5th Ed.) Sec. 663, it is said: 'The same general rules which govern judgments generally apply to a judgment by consent or upon stipulation. It is an estoppel, merger or bar under the same circumstances and to the same extent as any other judgment.' In *Harding* v. *Harding*, 198 U. S. 317, 25 S. Ct. 679, 684, 49 L. Ed. 1066, the court said: 'The general rule in Illinois undoubtedly is that a consent decree has the same force and effect as a decree in invitum. *Knobloch* v. *Mueller*, 123 Ill. 554, 17 N. E. 696; *O'Connell* v. *Chicago Terminal Transfer R. Co.*, 184 Ill. 308,

325, 56 N. E. 355.' In *Swift & Co.* v. *United States*, 276 U. S. 311, 48 S. Ct. 311, 314, 72 L. Ed. 587, the court adhered to the rule in the following language: 'But "a decree, which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause" *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 113 U. S. 261, 266, 5 S. Ct. 460, 28 L. Ed. 971. Compare *United States* v *Babbitt*, 104 U. S. 767, 26 L. Ed. 921; *McGowan* v. *Parish*, 237 U. S. 285, 295, 35 S. Ct. 543, 59 L. Ed. 955 * * *.'"

Petitioners contend that jurisdiction cannot be conferred by consent. In certain cases that is true. For instance, where jurisdiction is based on diversity of citizenship and where the record affirmatively shows that there was no diversity, that rule has been frequently applied. Such are most of the cases cited by petitioners. That is not the situation here. Here the record facts showed affirmatively that the Court did have jurisdiction of the Escrow Fund. However, any question of jurisdiction of the Court that could have been raised by any party based on any forced construction or interpretation of the undisputed facts alleged was expressly waived by the order of May 27th approved and consented to by all parties, including petitioners.

The same argument now made by petitioners was made by the defendants in the leading case of

Swift & Company, et al. v. *United States*, 276 U. S. 311; 72 L. Ed. 578.

This Court said, L. Ed. p. 596:

"Decrees entered by consent have been reviewed upon appeal or a bill of review where there was a claim of lack of consent to the decree's entry; * * * or a fraud in its procurement; * * * or that there was a lack of Federal jurisdiction because of citizenship of the parties; * * * but a decree 'which appears

by the record to have been rendered by consent is always confirmed without considering the merits of the cause'." * * *

And, on p. 597:

"It is contended that the consent decree was without jurisdiction because it was entered without the support of facts. The argument is that jurisdiction under the Anti-Trust Acts cannot be conferred by consent. * * * The argument ignores both the nature of injunctions, already discussed, and the legal implications of a consent decree. The allegations of the bill not specifically denied may have afforded ample basis for a decree limited to future acts. * * * If the court erred in finding in these allegations a basis for fear of future wrong sufficient to warrant an injunction, its error was of a character ordinarily remediable on appeal. Such an error is waived by the consent to the decree. *United States* v. *Babbitt*, 104 U. S. 767, 26 L. Ed. 921; *McGowan* v. *Parish*, 237 U. S. 285, 295, 59 L. Ed. 955, 963, 35 Sup. Ct. Rep. 543. Clearly it does not go to the power of the court to adjudicate between the parties." * * *

"It is contended that even if the decree is not void as a whole, parts of it must be set aside as being in excess of the court's jurisdiction. * * * Moreover, the defendants, by their consent, lost the opportunity of raising the question on appeal. * * *;"

On May 24th the first order on these respondents' petition of that date was entered without objection from petitioners. (R. 17-18.) On May 27th the second order was entered with the approval and consent of all parties, including petitioners. The same day petitioners complied with that part of the order of May 27th directing them to distribute 75% of the Escrow Fund. Afterwards, in the pleadings filed by petitioners on June 3rd, they questioned only the right of the Court to distribute the Fund while there was pending the motion of the bankrupt to quash service upon it. (R. 54-56.) This motion was overruled on June 29th. (R. 75.) Thereupon these respondents petitioned that the part of the balance of the

Fund, to which no claim had been made, be distributed to them. (R. 69-73.) Petitioners declined to plead to the merits of this petition but insisted that the Court had no jurisdiction to distribute the Fund because of defective service of process upon the bankrupt. (R. 73-74.) They reiterated a claim that had already been adjudicated, and presented no facts. Even had they presented facts to the Court showing that they were adverse claimants, which they never did, the Court would have had full jurisdiction and power to enter the orders of July 12th and 13th.

Thus, in

Page v. *Arkansas Natural Gas Corporation*, (C. C. A. 8th Cir.) 53 F. (2d) 27, affirmed in 286 U. S. 269, 76 L. Ed. 1096,

the Court said, p. 35:

> "In 5 Remington on Bankruptcy, Sec. 2195, p. 280, it is said: 'Jurisdiction may be conferred on the bankruptcy court by the defendant's consent, in cases where otherwise it has no jurisdiction, and if adverse claimants in possession of the property who would otherwise not be within the jurisdiction of the bankruptcy court, nevertheless voluntarily surrender custody of the property, or consent to the jurisdiction of the bankruptcy court, then the question of ownership and all other questions in relation thereto, as, for instance, the extent, validity and priority of liens upon and interest in the property, may be tried out in the bankruptcy proceedings.'
>
> "Further, no objection to the form of proceeding appears to have been taken until too late."

To the same effect see:

Bachman v. *McCluer* (C. C. A. 8th Cir. 1933), 63 F. (2d) 580, 583.

In re J. C. Winship Co. (C. C. A. 7th Cir. 1903), 120 F. 93, 96.

Remington on Bankruptcy (4th Ed. 1936) Vol. 5, p. 330.

But, say petitioners in their petition, (pp. 22-23.) assuming arguendo that jurisdiction can be conferred by consent, we did not consent. We approved of and agreed to the order of May 27th, but the order does not mean what it says and, therefore, we consented to what it means and not to what it says. And to prove that the order does not mean what it says they permit—to speak mildly—their imaginations to run riot, as was pointed out by us on page 15.

Under the facts in this case and the law applicable thereto, petitioners are estopped to complain of or appeal from the orders of July 12, and July 13, 1937.

III.

The Appeal to the Circuit Court of Appeals and the Petition for a Writ of Certiorari to This Court Were Filed for Delay Only. Petitioners Odell and Harris Were at the Most Mere Stakeholders or Custodians of That Part of the Escrow Fund They Had Been Ordered to Distribute to Its Owners, and Had No Other Interest Therein and, Therefore Have No Appealable Interest.

Mere custodians or stakeholders of a fund who have no personal interest therein have no appealable interest in a decree ordering them to distribute the fund. It appears from the undisputed facts in this record that petitioners have no personal interest in the Escrow Fund, part of which they were ordered to distribute by the order from which they appeal. The undisputed facts prove that they are mere naked custodians or stakeholders. (R. 27, 34, 39-40, 96-99.)

In the letter creating the Escrow Fund, Odell and Harris said "the funds are not the funds of the undersigned but are under the custody and control of the undersigned."

(R. 23, 27.) The consent order of May 27th found that the Escrow Fund consisted of money which belonged to respondents and to other contractors represented by Odell (R. 39-40) and, therefore, that petitioners had no personal interest therein. Nowhere is there any finding, or can any inference be drawn from any pleading or finding in the entire record that petitioners had any interest in the Escrow Fund other than as naked custodians thereof.

Petitioners say, however, that, had they not been deprived of the right to plead to the merits, they would have shown that they were not mere stakeholders or custodians of this Fund. Concerning this the Court of Appeals said:

> "Appellants do not state, but intimate they have some interest in the funds in question. If so, they should have exerted such claim. It cannot be said they did not have an opportunity to do so. On one occasion the court expressly directed them to file an answer as to the merits, but this they refused or neglected to do. Even as to the $20,000 remaining in the fund, they were given permission to answer to the merits, but instead they appeal on the alleged jurisdictional matter. Under such circumstances they are in no position to here complain of the denial of a right which they could have availed themselves of had they so desired. What interest in this fund they might assert, we do not know, but we are convinced from an examination of the record that they could have no interest or claim for services rendered in connection with the litigation of the matter of the Sales Tax, as the agreement between appellees and the alleged bankrupt explicitly provided that such services were to be paid for by the latter and without costs to appellees." (R. 133.)

Petitioners have no interest in the Fund ordered to be distributed. They therefore have no appealable interest, and no right to appeal.

Hamilton Trust Co. v. *Cornucopia Mines Co.* (C. C. A. 9th Cir. 1915), 223 F. 494, 499.

King v. *Buttolph, et al.* (C. C. A. 9th Cir. 1929), 30 F. (2d) 769, 770.

Grier, et al. v. *Union Nat. Life Ins. Co.*, 217 F. 293.

Kirkpatrick v. *Eastern Milling & Export Co.*, 135 F. 151, 152.

Even petitioners' statement in their petition for certiorari as to what they would have shown had they not been deprived of pleading to the merits (petition, p. 24) shows that they have no interest in the Fund except as naked custodians thereof.

For instance, respondents have admitted that as escrow officers they were trustees of the Escrow Fund. (R. 168.) If they are trustees of a Fund belonging to over 300 contractors, then, under no legal theory has Odell a lien on or an interest in the Fund, merely because he may have claims for legal services against some of the owners of the Fund arising out of personal contracts between them and him having no connection with the Fund. See

Lewis v. *Canadian Pacific Railway Co., et al.*, (C. C. A. 7th Cir. 1930), 39 F. (2d) 834.

Story v. *Hull et al.*, 143 Ill. 506.

Petitioners say there is an injunction pending in another court. Of course, this is totally outside the record, but if such an injunction existed and was of any force, why were petitioners willing to and why did they deliberately violate it by distributing $242,200 of the Fund?

Respondents submit that the character of petitioners' petition for certiorari is confirmation of the fact that petitioners' petition was frivolous and has been pursued solely for the purpose of delay. The Circuit Court of Appeals ordered that petitioners pay interest on this money they had withheld since July 12, 1937. This order must have been based on the conclusion that petitioners' appeal to the Circuit Court of Appeals was frivolous and devoid of any substantial merit. It may be asked why petitioners

have pursued their course of delay. We suggest that it is a fair inference that they have attempted to delay the distribution of money in which they have no interest and cause annoyance and expense to the owners thereof, in the hope that their tactics may ultimately result in some material advantage to them.

IV.

At No Step in the Proceedings Did the District Court Abuse Its Discretion or Deny Petitioners Any Legal Rights.

Petitioners charge that the District Court deprived them of a hearing on the merits, abused its discretion in disregarding equity and bankruptcy rules, that confusion and misunderstanding existed between the Referee and the Court, that the attorney for respondents was guilty of unethical conduct, that the District Court approved of false orders, that the Circuit Court of Appeals made findings of fact without any basis therefor—all without anything in the record to support their assertions.

Even if all these charges were true, they presented no substantial question of general law upon which this Court has not passed, or concerning which there is conflict between various Courts of Appeal.

Their charges are without basis in record facts. Most of them are predicated upon the charge that the order of June 29th (R. 73-74) was a false order. We have previously remarked about this assertion, *supra*, p. 14.

This is what the record shows: On May 27th petitioners agreed that the Court had jurisdiction over the Fund. On June 3rd they filed a special claim of lack of jurisdiction because there was still pending undisposed of a motion of the bankrupt to quash service upon it. On June 29th the Court overruled this motion and decreed that the bankrupt

had appeared in the cause generally and the Court had jurisdiction to determine the merits of the cause. (R. 75, 76.) Then respondents' petition of June 29th was filed. No one except Odell and Harris objected to the entry of an order in accordance with the prayer of the petition. (R. 74, 97.) The Court directed Odell and Harris to answer to the merits of the petition. They said they did not desire to do so but to stand on the same pleas they had filed to the petition of May 24th. (R. 74.) The Court said in substance: "But I have decided that question of jurisdiction and I therefore direct you to plead to the merits." Odell and Harris refused to plead. There was nothing then before the Court except a question of law that the Court had already decided. However, he gave the petitioners full opportunity to argue the matter before the Master. When the Master made his report, Odell and Harris asked leave to file exceptions, and filed them. (R. 97.) The exceptions were considered and overruled. (R. 98.) Even then, no motion was made to file an answer on the merits. Petitioners asked leave to file a second amended supplemental answer (R. 96) which answer, considering what had preceded and what followed, would have been another attack on the jurisdiction of the Court. The next day, July 13th, the Court entered an order concerning the $20,000 remaining in the Fund after the distribution of the $48,580.40 provided for by the order of July 12, 1937. It again overruled petitioners' pleas or answers of lack of jurisdiction and directed them to answer to the merits within 20 days as to this $20,000. (R. 99-101.) They answered, but not to the merits. They claimed the Court had no jurisdiction to order them to answer to the merits. (R. 110-111.)

Petitioners claim (p. 27) that they suffered grievious injustice because the order of June 29th did not refer the matter to the Referee on the bank's answer and the bank had not been present at the hearing. The bank and all other

parties, except the petitioners, had already consented to the prayer of respondents' petition. (R. 74, 97.)

The reference to William L. Sullivan was not a reference to him as a Referee in Bankruptcy, but as a Special Master because there had been no adjudication of the alleged bankrupt. Therefore, Rule 14 of the Bankruptcy Act is not applicable. Equity Rule 66, if at all applicable, was in no way violated. Under the circumstances which existed when there was only one question before the Court, and that of law with no testimony or disputed facts, it was even superfluous for the Court to refer the cause to the Master or to give the respondents leave to file exceptions to the Master's Report. In any event, the Court was not bound to follow Equity Rule 66. The equity rules are to be looked to as analogies, but not as to rules binding on a bankruptcy court.

In re Kenney & Greenwood, 23 F. (2d) 681.
International Harvester Co. v. *Carlson*, 217 F. 736.

It is submitted that the District Court exercised its discretion wisely; that it treated petitioners with more patience and consideration than they deserved, and that it gave them ample time and full opportunity to present their claims and their rights.

Conclusion.

The petitioner, Benjamin F. J. Odell, is an attorney selected by the bankrupt to act for respondents without charge to respondents. He was not only the selection of the bankrupt, but was to be paid by the bankrupt. The petitioner, Roy G. Harris, is the President of the bankrupt. Together, the bankrupt, Odell and Harris devised the neat scheme of not merely making the $21,500 if they were successful in the Sales Tax litigation, but of also having re-

dents put a large sum of money in their custody and rol so that, if they were unsuccessful in the litigation, ondents would nevertheless be unable to obtain their ey unless they met petitioners' demands. When peti- ers were confronted by the possibility that their refusal rn over respondents' money to respondents might sub- them to a personal liability of $100,000, they consented he District Court's taking jurisdiction of the Escrow d and distributing it. Then, believing that they had ved themselves of the possibility of that personal lia- y, they attempted to retract their consent and claim the Court had no jurisdiction. They have no interest he Fund, certainly not that part of the Fund which the rt ordered them to turn over to respondents.

nder these circumstances and for the reasons above orth, it is respectfully submitted that the orders of the rict Court of July 12, and July 13, 1937, and the orders he United States Circuit Court of Appeals affirming costs said orders of the District Court, and ordering petitioners pay to respondents interest on $48,580.40 he rate of 5% per annum from July 12, 1937, until said 580.40 is paid, are correct, just and proper.

is further respectfully submitted that petitioners' peti- for certiorari has been filed merely for the purpose elay; that the questions on which the decision of this e depends are trivial and unsubstantial; that this Court ld, therefore, sustain respondents' motion to dismiss writ or affirm the orders of the District Court and the uit Court of Appeals, and should also enter an order ssing against petitioners damages in the sum of 10% 48,580.40, in accordance with Rule 30 of this Court.

Respectfully submitted,

SIGMUND W. DAVID,
Attorney for Dahl-Stedman Co., et al., Respondents.

APPENDIX A.

In the District Court of the United States,

For the Northern District of Illinois,

Eastern Division.

In the Matter of
Tax Service Association of Illinois, a corporation, Alleged Bankrupt. } In Bankruptcy No. 65890.

Order Approving Report of Special Master, Order of Adjudication in Bankruptcy, Etc.

This cause coming on to be heard upon the motion of the petitioning creditors for the approval of the report of Special Master William L. Sullivan, with reference to the involuntary petition in bankruptcy and the second amended answer filed thereto, and upon the exceptions of the alleged bankrupt heretofore filed to the said Special Master's report. • • •

And the Court having heard arguments of counsel and having considered the said Special Master's report, the exceptions of both the alleged bankrupt and the petitioning creditors filed thereto, the transcript of evidence, the pleadings, the abstracts and the briefs of the respective parties, and being fully advised in the premises, finds:

• • •

2. That this Court has jurisdiction of the subject matter hereof and of the parties hereto.

3. That on the day of the filing of the involuntary petition in this cause, and prior thereto, the alleged bankrupt was and is a moneyed business or commercial corporation

nable to an involuntary petition in bankruptcy within purview of the Bankruptcy Act.

* * *

. That an order should be entered forthwith adjudi-ng Tax Service Association of Illinois a bankrupt and rring this cause generally to a Referee in Bankruptcy;

* * *

is further ordered that Tax Service Association of Illi-, a corporation, be and it is hereby ordered adjudged a krupt and this case be and it is ordered referred gener-to the Honorable William L. Sullivan, Referee in Bank-cy, and that a rule be and the same is hereby entered the alleged bankrupt to file its schedules in this cause in Ten (10) days from and after the date hereof.

* * *

ENTER:

PHILIP L. SULLIVAN,
Judge.

o the entry of which order the alleged bankrupt ex-s.

TED STATES OF AMERICA,
THERN DISTRICT OF ILLINOIS. } ss.

HENRY W. FREEMAN, Clerk of the United States Dis-Court in and for the Northern District of Illinois, do by certify that the annexed and foregoing is a true and copy of the original Order entered April 27, 1938, In Matter of Tax Service Association of Illinois, a corpo-on, in bankruptcy No. 65890 now remaining among the rds of the said Court in my office.

further certify that to the date hereof no Appeal has taken from said Order.

TESTIMONY WHEREOF, I have hereunto subscribed my e and affixed the seal of the aforesaid Court at Chi-, Illinois, this 13th day of September, A. D. 1938.

HENRY W. FREEMAN,
Clerk.

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